

Larry A. Hammond, 004049
Anne M. Chapman, 025965
OSBORN MALEDON, P.A.
2929 N. Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
(602) 640-9000
lhammond@omlaw.com
achapman@omlaw.com

John M. Sears, 005617
P.O. Box 4080
Prescott, Arizona 86302
(928) 778-5208
John.Sears@azbar.org

Attorneys for Defendant

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JEROME H. CLERK

BY: N. Seguir

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

No. P1300CR20081339

Div. 6

**DEFENDANT'S MOTION IN
LIMINE TO PROHIBIT
PROSECUTORIAL
MISCONDUCT**

Pursuant to Arizona Rule of Criminal Procedure 16, Defendant Steven DeMocker, by and through counsel, hereby moves this Court *in limine* to preclude the prosecutor from making improper remarks and argument. This Motion is supported by the Due Process Clause and Eighth Amendment of the United States Constitution and the Arizona Constitution counterparts and this Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

The prosecutor has an obligation to seek justice, not merely a conviction, and must refrain from using improper methods to obtain a conviction. *See State v. Bible,*

1 175 Ariz. 549, 600, 858 P.2d 1152, 1203 (1993); *Pool v. Super. Ct.*, 139 Ariz. 98, 103,
2 677 P.2d 261, 266 (1984). "We emphasize that the responsibilities of a prosecutor go
3 beyond the duty to convict defendants. Pursuant to its role of 'minister of justice,' the
4 prosecution has a duty to see that defendants receive a fair trial." *State v. Hughes*, 193
5 Ariz. 72, 80, 969 P.2d 1184, 1192 (1998); Ariz. R. Sup. Ct. 42, E.R. 3.8, comment;
6 *State v. Cornell*, 179 Ariz. 314, 331, 878 P.2d 1352, 1369 (1994). *See also State v.*
7 *Rodriguez*, 192 Ariz. 58, 64, 961 P.2d 1006, 1012 (1998). Cumulative prosecutorial
8 mis[conduct can infect a trial and effect fundamental notions of due process leading to a
9 mistrial. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). "Reversal on the basis
10 of prosecutorial misconduct requires that the conduct be 'so pronounced and persistent
11 that it permeates the entire atmosphere of the trial.'" *State v. Atwood*, 171 Ariz. 576,
12 611, 832 P.2d 593, 628 (1992) *overruled on other grounds by* (quoting *United States v.*
13 *Weinstein*, 762 F.2d 1522, 1542 (11th Cir.1985) and *United States v. Blevins*, 555 F.2d
14 1236, 1240 (5th Cir.1977); *see also State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222,
15 1230 (1997). To determine whether prosecutorial misconduct permeates the entire
16 atmosphere of the trial, the court necessarily has to recognize the cumulative effect of
17 the misconduct.

18 Intentional and pervasive misconduct on the part of the prosecutor can give rise
19 to a double jeopardy bar under the Fifth Amendment against retrial of a defendant as
20 well. *See e.g. State v. Minnitt*, 203 Ariz. 431, 438, 55 P.3d 774, 781 (2002).

21 **1. Limitations on Prosecution's Questioning and Argument.**

22 Counsel's questioning and arguments cannot make insinuations that are not
23 supported by the evidence. *See State v. Cornell*, 179 Ariz. at 331, 878 P.2d at 1369;
24 *State v. Williams*, 111 Ariz. 511, 515, 533 P.2d 1146, 1150 (1975). In this case the
25 attorneys for the State have made multiple arguments and asked questions of witnesses
26 both in evidentiary hearings and in front of two grand juries that are wholly unsupported
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1 by the evidence. This Court should prohibit this conduct from continuing to take place
2 during the trial of this matter.

3 At the January 15, 2009 *Simpson* hearing, Deputy County Attorney Mark Ainley
4 made the following improper arguments, with no evidentiary support: "[T]he injuries
5 are to the right side of the victim's body swung by a person who is left handed."
6 (January 15, 2009 *Simpson* argument at 6:14-15.) "It was a situation where Carol
7 Kennedy wanted to throw Mr. DeMocker under the bus and report him for fraud and
8 that would have been an end to his career, not something that he could allow, and so the
9 man goes into operation." (*Id.* at 10:23-11:2.) "That denotes rage. That's not a person
10 who just knocks somebody on the head until they go down. ... That's somebody who
11 is enraged at that point, shatter the skull into 50 pieces and rage always tells us that
12 there is a relationship there. There was a relationship between the person wielding the
13 club and the person getting hit and it was -- and the reason that they kept on going was a
14 rage, a sense of betrayal, a hurt to the ego." (*Id.* at 11:21-12:5.) "You wear the gloves.
15 You put on a pair of overalls over your bike clothes. You change your shoes. You
16 carry a little backpack with you that's got your stuff in it that you're going to use and
17 you go in. You commit the crime and you come out and you burn it all. You burn the
18 clothes. You burn the shoes. You burn the gloves. You burn the golf club." (*Id.* at
19 43:4-10.)

20 Other examples of the State's improper arguments in this case abound. At the
21 argument on the *Simpson* hearing on this matter on January 16, 2009, Mr. Ainley
22 acknowledged that his assertion that Mr. DeMocker had worn gloves and overalls and
23 carried a backpack was pure speculation on his part. (January 16, 2009 transcript at
24 40:8-16). However, Mr. Ainley advised the Court that because this was merely
25 argument and not evidence "it is helpful for the Court or jury to understand or explain
26 the evidence." (*Id.*) This is precisely the kind of inference without evidentiary support
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1 that is prohibited. Mr. Ainley further argued in support of his unsupported assertion that
2 Mr. DeMocker destroyed the shoes he was wearing at the time of the attack that "it's
3 not a real big leap to figure out that he probably got rid of the pair of shoes because it's
4 going to be covered with blood." (*Id.* at 41:24-42:1.) The State has absolutely no
5 evidence that Mr. DeMocker owned shoes that are associated with the tracks found
6 behind the victim's home, that he destroyed any shoes or that he was wearing shoes
7 covered in blood. Also, presenting unsupported testimony provided to the grand jury
8 that the attacker was left handed was defended by Mr. Ainley as "common sense" and
9 not taking a "rocket scientist" to figure out. (*Id.* at 45:9-15.) Similarly, his rank
10 speculation that the offense demonstrated "rage" and a relationship with the attacker
11 was again defended by Mr. Ainley as an example of "common sense." (*Id.* at 16-24.)
12 The State has no evidence to support these assertions and should be prohibited from
13 making them and similarly unsupported speculations to a jury. At the second
14 proceeding before a grand jury, Mr. Ainley continued with these and other improper
15 questions, asking whether the lab could detect if someone wore a glove. (Second Grand
16 Jury Transcript at 76:2-14.) Mr. Ainley also asked Mr. Echols to speculate about what
17 the IRS might do if notified of Mr. DeMocker's alleged fraud, calling it "hanky panky,"
18 eliciting testimony with no evidentiary basis that Mr. DeMocker would "lose
19 everything" and be "in serious trouble." (*Id.* at 147:4-148:2.)

20 Mr. Butner made similar arguments not based in fact at the *Bocharski* re-
21 sentencing, speculating on how the killing occurred by telling the jury "I am not
22 necessarily agreeing that it happened that way. I think that maybe it happened that he
23 goes into her trailer, her purse is right there by the door. He sees it, he is going to take
24 the \$500 and she is on the bed and he stabs her on the bed while she is laying there
25 curled up and sleeping." (June 16, 2006 transcript at 34:15-20, *State v. Bocharski*)
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27
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1 Likewise, jury argument that impugns the integrity or honesty of opposing
2 counsel is also improper. *See State v. Denny*, 119 Ariz. 131, 134, 579 P.2d 1101, 1104
3 (1978); *State v. Gonzales*, 105 Ariz. 434, 436, 466 P.2d 388, 390 (1970). The
4 prosecutor who comments on a defendant's failure to testify violates both constitutional
5 and statutory law. *See* Ariz. Const. art. 2, § 10; A.R.S. § 13-117(B) (1989); *State v.*
6 *Schrock*, 149 Ariz. 433, 438, 719 P.2d 1049, 1054 (1986). Furthermore, arguments
7 appealing to jurors fears are improper. *State v. Makal*, 104 Ariz. 476, 478, 455 P.2d
8 450, 452 (1969). *See also State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990).
9 The *Comer* court held that a prosecutor improperly appealed to the jurors' emotions by
10 referring to the defendant as a "monster," "filth," and the "reincarnation of the devil on
11 earth." *Id.* Prosecutors "may comment on the vicious and inhuman nature of the
12 defendant's acts," but "may not make arguments which appeal to the passions and fears
13 of the jury." *Id.* Mr. Butner made a similar argument at the *Bocharski* sentencing, that
14 "There was only one monster in this trial." (June 16, 2006 transcript at 37:2-3.) Also,
15 the State has already developed a penchant for appealing to fear in this case by alluding
16 to the O.J. Simpson case. Mr. Ainley said at the January 15 *Simpson* argument, "Says,
17 gee, judge, they should be out looking for the killer, just like O.J.'s wife's killer."
18 (January 15, 2009 *Simpson* argument at 40:13-14.) He didn't stop there. "Hmm. I
19 think I heard that in another trial where somebody killed their wife. Worked in that one.
20 Don't let it work in this one." (*Id.* at 45:5-7.) This is precisely the kind of improper
21 appeal to public fear that is prohibited and should not be tolerated at this trial.

22 In addition, "[i]t is black letter law that it is improper for a prosecutor to vouch
23 for a witness." *Bible*, 175 Ariz. at 601, 858 P.2d at 1204. "Two forms of impermissible
24 prosecutorial vouching exist: (1) when the prosecutor places the prestige of the
25 government behind its witness, and (2) where the prosecutor suggests that information
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1 not presented to the jury supports the witness's testimony." *State v. Dumaine*, 162 Ariz.
2 392, 401, 783 P.2d 1184, 1193 (1989).

3 **2. The Death Penalty Requires a Heightened Standard of Reliability.**

4 "[T]he penalty of death is qualitatively different from a sentence of
5 imprisonment, however long. Death, in its finality, differs more from life imprisonment
6 than a 100-year prison term differs from one of only a year or two." *Woodson v. North*
7 *Carolina*, 428 U.S. 280, 305 (1976). As a result, the United States Constitution requires
8 that "extraordinary measures [be taken] to insure that the [accused] is afforded process
9 that will guarantee, as much as is humanly possible, that [a sentence of death not be]
10 imposed out of whim, passion, prejudice, or mistake." *Caldwell v. Mississippi*, 472
11 U.S. 320, 329 n.2 (1985) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982)
12 (O'Connor, J., concurring)). Indeed, "[t]ime and again the [Supreme] Court has
13 condemned procedures in capital cases that might be completely acceptable in an
14 ordinary case." *Caspari v. Bolden*, 510 U.S. 383, 393 (1994) (quoting *Strickland v.*
15 *Washington*, 466 U.S. 668, 704-705 (1984) (Brennan, J., concurring in part and
16 dissenting in part)). See also *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (noting that the
17 Court's "duty to search for constitutional error with painstaking care is never more
18 exacting than it is in a capital case.") (quoting *Burger v. Kemp*, 483 U.S. 776, 785
19 (1987)). This elevated level of due process applies both to the guilt and penalty phases
20 of the case. *Beck v. Alabama*, 447 U.S. 625, 638 (1980).

21
22 **CONCLUSION**

23 Defendant Steven DeMocker, by and through counsel, hereby moves this Court
24 for an order *in limine* prohibiting the State from making improper remarks and
25 argument of the kind and nature of those set forth herein.

1 DATED this 18th day of December, 2009.

2
3 By: 

4 John M. Sears
5 P.O. Box 4080
6 Prescott, Arizona 86302

7 OSBORN MALEDON, P.A.
8 Larry A. Hammond
9 Anne M. Chapman
10 2929 N. Central Avenue, Suite 2100
11 Phoenix, Arizona 85012-2793

12 Attorneys for Defendant

13 **ORIGINAL** of the foregoing filed
14 this 18th day of December, 2009, with:

15 Jeanne Hicks
16 Clerk of the Court
17 Yavapai County Superior Court
18 120 S. Cortez
19 Prescott, AZ 86303

20 **COPIES** of the foregoing delivered
21 this 18th day of December, 2009, to:

22 The Hon. Thomas B. Lindberg
23 Judge of the Superior Court
24 Division Six
25 120 S. Cortez
26 Prescott, AZ 86303

27 Joseph C. Butner, Esq.
28 Prescott courthouse basket


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